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shown when he made this declaration; second, because the declarations were not confined to the facts connected with the homicide. As to this second ground the court was clearly right and Keith, P., concurred in that part of the majority opinion, but as to the first ground of reversal it seems that the court is wrong because as stated in the dissenting opinion a sense of impending death is a mental condition and this mental attitude can be ascertained in no other way than by what the declarant may say or do. See 10 Encyc. Law, 2nd Ed., p. 387.

That the declarations were made under a sense of impending death may be made to appear from what the injured person said; or from the nature and extent of the wounds inflicted, being obviously such that he must have felt or known that he could not survive; as well as from his conduct at the time and the communications, if any, made to him by his medical advisers, if assented to or understandingly acquiesced in by him. Mattox v. United States, 146 U. S. 140, 151, 36 L. Ed. 917.

To our mind the court attached too much weight to the fact that the deceased made no arrangements about dying, either as to his worldly affairs or as to his soul; that he asked nobody to have prayers or read the Bible, and did not ask for a preacher. Many explanations might be offered for this omission, and requiring such acts would unduly narrow the channel through which this evidence is admitted. He repeatedly spoke of dying and this is ordinarily sufficient. While in this particular case the lower court should have been reversed on the second ground, yet this ruling is destined to have a pernicious influence as a precedent, and if strictly adhered to will result in excluding many dying declarations, otherwise admissible. "Let there be light" is a good general rule of evidence.

In State v. Kilgore, 70 Mo. 553, the court admitted the force of the argument that the silence of the deceased as to his estate or any disposition of it, etc., was a circumstance showing that he was not conscious that death was impending, but it was added that such argument is greatly weakened in a case where the accused is seriously or dangerously wounded.

And as further authority against the ruling of the court that preparation for the hereafter is material in determining whether the deceased regarded himself in articulo mortis, it has been held that his use of profane language does not render the declarations inadmissible on the ground that such conduct shows an absence of that feeling of solemnity supposed to be present in case of the belief of impending death, the court remarking that it is common knowledge that persons addicted to the use of curse words use them almost unconsciously on solemn occasions. State v. Brady (Ala.), 50 Southern 806.

MUSE et al. v. GISH.

Sept. 9, 1912.

[75 S. E. 764.]

Easements (§ 18*)—**Ways of Necessity.**—A private roadway having been established by testator during his ownership of an entire tract of land, it will, if reasonably convenient and necessary, be con-

tinued for the use and benefit of his devisees and those claiming under them upon a division of the tract under the will.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 50-55; Dec. Dig. § 18.*]

Appeal from Circuit Court, Roanoke County.

Bill by Sidney M. Muse and others against G. G. Gish. Decree dissolving a preliminary injunction and dismissing the bill, and plaintiffs appeal. Reversed.

Kime & Fox, for appellants.
W. W. Ballard, J. E. Gish, and *Jackson & Henson*, for appellee.

WHITTLE, J. This is an appeal from a decree dissolving a preliminary injunction and dismissing the bill in a suit brought by the appellants to enjoin the appellee from obstructing the plaintiffs in the use and enjoyment of a private roadway affording them means of outlet from their respective properties, which are entirely surrounded by the lands of private parties, through lot No. 1, the land of the defendant, to the "Vinton public road."

The obstructions complained of were occasioned by the defendant plowing up a portion of the private roadway and locking the gates opening into the same and into the public highway. The property affected consisted originally of 405 acres of land, situated in Roanoke county, near Vinton, and belonging to John B. McClung, who died testate in the year 1901. Shortly after the death of testator the land was partitioned amongst his devisees. Lot No. 1, containing 67 acres, was allotted to his granddaughter, a Mrs. Jones, and was afterwards purchased by the appellee, G. G. Gish.

For many years during the lifetime of John B. McClung there was a private roadway, known as the "old road," leading from the mansion house to the Vinton public road" at the present outlet. The route of the old road was from the mansion house, passing a white oak at station 16 (on a map filed with the record) to Berkeley's corner, thence in part over and along Berkeley's line to station 15, and thence off through what is now lot No. 1, by station B, to station A, on the public highway. Several years prior to McClung's death a dispute arose between himself and Berkeley touching the correct location of the dividing line between them from station 16 to station 15, the latter claiming to the center of the road. The line was eventually surveyed, and Berkeley erected a line fence in the middle of the roadway from 16 to 15. Thereupon McClung discontinued the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

old road between those points, and from 15 to B, and established what is now known as the "new road," a straight road from 16 to B, thus providing a continuous road over his own land from the mansion house to the public road at station A. The portion of the old road from 16 by 15 to B, on McClung's side, was wholly discontinued and plowed up, and since that time has been under cultivation as other parts of the farm.

We have not undertaken to discuss the evidence in detail, but merely to give our conclusions therefrom. The foregoing summary is sustained by the preponderance of the testimony, and is an accurate presentation of the situation at the death of McClung, at the time the commissioners partitioned the land amongst his devisees, and at the date of appellee's purchase of lot No. 1.

When appellee bought lot No. 1, the new road had been established for several years, and was apparent and necessary, and in continuous and uninterrupted use by the appellants. Moreover, the defenses relied on by the appellee show that he purchased lot No. 1 with actual knowledge of the existence of the new road. Thus, he proved by T. B. Jones, the husband of his vendor, that McClung discussed with him a purpose on his part to discontinue the new road and to open in place of it another road along the route of the old road. But, however that may have been, McClung did no act in furtherance of such intention, but continued to use the new road as long as he lived.

Gish also attempted to prove by Jones a parol agreement between them, which he says was acquiesced in by "the heirs," to change the location of the new road to its original position. Yet, if any such agreement was made, it was inchoate, and was never attempted to be consummated.

The remaining ground of defense involves the contention that appellants had another outlet to a public road by a private way over the land of W. G. Wood. But this allegation is wholly disproved and seems to have been abandoned.

The roadway in question having been established by John B. McClung during his ownership of the entire boundary of 405 acres of land, it will, if reasonably convenient and necessary, be continued for the use and benefit of his devisees (and those claiming under them) upon a division of the land under the provisions of testator's will. The rules of law governing ways of necessity apply to the facts of this case; and the decisions of this court abundantly sustain the rights of appellants to the unobstructed use of the roadway established by John B. McClung from the mansion house to the point of connection with the "Vinton public road" at station A. Hardy *v.* McCullough, 64 Va. 259; Deacon *v.* Doyle, 75 Va. 258; Sanderlin *v.* Baxter, 76

Va. 299, 44 Am. Rep. 165; French *v.* Williams, 82 Va. 462, 4 S. E. 591; Bond *v.* Willis, 84 Va. 796, 6 S. E. 136; Scott *v.* Moore, 98 Va. 668, 37 S. E. 342, 81 Am. St. Rep. 749.

For these reasons, the decree of the circuit court must be reversed, and this court will make such decree as the trial court ought to have made, perpetuating the injunction, with costs.

Reversed.

CLINCHFIELD COAL CO. *et al. v.* SUTHERLAND.

Sept. 9, 1912.

[75 S. E. 765.]

1. **Dower** (§ 17*)—**Right to Compel Conveyance.**—After a husband sold his undivided interest in land under provision for deferred payments, alimony was decreed against him, with provision that, upon the wife executing a deed releasing her contingent right of dower to the land, the purchaser should pay her the amount fixed as alimony. The wife was not a party to her husband's contract to convey, nor to the deed, and refused to convey her dower right. Held, that an assignee of the claim for the fees of the wife's counsel in a suit in which the alimony was decreed is not entitled, though he has reduced the claim to judgment, to maintain suit against the husband and wife and the purchaser of the land to compel a conveyance by the wife to the purchaser of her contingent right of dower, and to compel the purchaser to pay the amount of the judgment to such assignee; it being optional with the wife to accept or reject the alimony on the terms prescribed.

[Ed. Note.—For other cases. see Dower, Cent. Dig. § 62; Dec. Dig. § 17.*]

2. **Dower** (§ 38*)—**Stipulations—Parties Bound by.**—A married woman is not bound by a stipulation concerning her dower right, contained in a deed made by her husband in which she did not join.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 89, 94, 95, 132; Dec. Dig. § 38.*]

Appeal from Circuit Court, Dickinson County.

Bill by S. H. Sutherland against the Clinchfield Coal Company and others. Decree for plaintiff, and defendants appeal. Reversed.

Vicars & Peery, W. H. Rouse, and *E. M. & E. H. Fulton,* for appellants.

Sutherland & Sutherland, for appellee.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.